

Globalisation and Legal Research

PETER THOMAS MUCHLINSKI*

The term “globalisation” is much used in contemporary academic and general discourse. “Globalisation” is not a term much favoured by the author. Like many apparently meaningful terms, it tends, upon closer examination, to dissolve, or worse, multiply into many other complex terms. Nonetheless, we are living in a world where interactions across borders appear significantly greater and faster than in the past, and which can be attributed to certain changes in technological, social, and economic organisation of humanity. The question is, then, how should legal researchers react to these changes? One answer may be to ignore “globalisation” as a meaningless concept. There are, however, increasing voices that ask certain normative questions as to the effect of “globalisation” on the evolution of legal thought and research. It is the purpose of this article to examine those voices and what they might be saying to us.

The article will be divided into two main parts. Part I will deal with the various interpretations attributed to the term “globalisation” in the social sciences. The aim is to identify the essential elements of the term that are central to the development of this concept. The second part will then examine the contribution of legal research to the understanding of “globalisation.” It, in turn, will be divided into two sub-parts. The first will attempt a stocktaking of the principal areas of existing legal theory and practice in which the regulation of cross-border activities is in issue. The second sub-part will then examine attempts to distil more normative, general theories of law and regulation from these initial building blocks and from the wider understanding of “globalisation” in other social sciences.

I. What is “Globalisation”?

Is “globalisation” merely a “buzz-word” or something more? Many people invoke notions of globalisation without clearly indicating what they mean. Lawyers seem particularly prone to doing this. However, that is not a good reason for rejecting the term outright in that “most key notions in social analysis are frequently used loosely and vaguely.”¹ Thus the task

*Professor of Law and International Business, Kent Law School, University of Kent at Canterbury, United Kingdom. This article is based upon the text of the author’s inaugural lecture delivered at the University of Kent at Canterbury on 22 November 2002, on the occasion of the Clive Schmotthoff Memorial Lecture.

1. JAN AART SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* 15, 43–44 (Palgrave 2000).

for the social scientist is to offer an accurate and usable definition of this term. At least five approaches can be identified outside law. These are, in no particular order: the geographical, economic, business management, sociological, and political science approaches. The empirical basis of these definitions is often similar—with much emphasis on the nature, types, and intensity of global economic and social interactions. However, the content and use of these definitions appears sufficiently specific to their particular disciplinary purpose to make such a classification meaningful, if only to detail the variety of definitional uses of this troublesome term.

First, the geographical approach: This stresses the relationship between space and time as an explanatory factor. Developments, such as the increase in the speed of travel and communications, are seen as the basis of the emergent global economy and society.² In addition, the activities of multinational enterprises (MNEs) are said to give rise to the emergence of what Peter Dicken calls a “new geo-economy,” characterised by changes in the geographical distribution of economic activity away from relatively self-contained national economies towards globally integrated cross-national production and distribution chains organised by MNEs.³

Second, the economic approach: This concentrates on an interpretation of economic data concerning cross-border economic activity over time. This is said to show economic changes leading to increased cross-border economic integration that is *qualitatively* different from earlier stages of international economic activity.⁴ Thus a distinction is to be made between *internationalisation*—the process of increasing economic activity across national borders, which has been going on for centuries—and true *globalisation*, which involves not only an increase in such activities, but also, their transformation into systems of integrated global economic activity, in the way described by Dicken above.

The third approach, the business management approach, is closely related to the first two, in that it offers much of the data concerning the development of global production and distribution chains by MNEs. The emphasis here is on the rise of global corporations, creating new vehicles for the global integration of trade and production.⁵ However, the significance of this phenomenon has been doubted by research showing that MNEs remain highly embedded in national economic and regulatory systems and that few corporations can be seen as truly global.⁶

Fourth, the sociological approach—here the emphasis is on greater cultural interchange and on the development of global social phenomena such as global consumption patterns,

2. VINCENT CABLE, *GLOBALIZATION AND GLOBAL GOVERNANCE* 3 (Royal Institute of International Affairs 1999).

3. PETER DICKEN, *GLOBAL SHIFT: TRANSFORMING THE WORLD ECONOMY* (Paul Chapman Publishing 3d ed. 1999).

4. See *generally* DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (Polity Press 1999).

5. KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY* (Fontana 1990). See also CHRISTOPHER A. BARTLETT & SUMANTRA GHOSHAL, *MANAGING ACROSS BORDERS: THE TRANSNATIONAL SOLUTION* (Random House Books 2d ed. 1998).

6. See PAUL N. DOREMUS ET AL., *THE MYTH OF THE GLOBAL CORPORATION* (Princeton Univ. Press 1998). See also Alan M. Rugman, *UK COMPETITIVENESS AND THE PERFORMANCE OF MULTINATIONAL COMPANIES IN 2000* (Report funded by the Economic and Social Research Council (ESRC) Sept. 2002). See also Larry Elliott, *Big Business Isn't Really That Big*, *THE GUARDIAN*, Sept. 2, 2002, at 23. See also Press Release, *ESRC: Strategies and Performance of the World's Biggest 500 Multinationals Expose the Myth of Globalisation*, Sept. 2, 2002, available at <http://www.esrc.ac.uk> (last visited Mar. 8, 2003).

transnational class formation, and what can be termed the global/local cultural paradox,⁷ as well as upon the economic manifestations of globalisation.⁸ This perspective therefore adds a more comprehensive set of issues to be examined as evidence of globalisation that go beyond the statistical and spatial phenomena of economic and geographical approaches to globalisation. Furthermore, this approach raises the question whether we are creating some kind of global ethical system, possibly based on respect for fundamental human rights, which can be seen as a constitutional dimension of globalisation. This is an issue that, as we shall see, plays large in the legal discussion of globalisation.

Finally, the political science approach emphasises the shift from an international political order dominated by the nation-state to an increasingly supranational structure of governance both at the regional and multilateral levels, as well as the possibility of a subversion, and possible displacement, of traditional forms of political organisation by powerful and unaccountable industrial and financial power centres based around global firms and markets.⁹ Again this approach is open to debate. As Martin Wolf asserts, globalisation, if anything, can make the state more, not less, significant as a vehicle for taking full advantage of the economic opportunities that international economic integration offers.¹⁰

In light of the foregoing, it is clear that while there are significant indicators that a process of increasing global economic integration is under way, how wide and how far it develops is unclear and open to speculation. In the light of such uncertainty, it is perhaps not surprising that the debate surrounding the term has acquired an ideological content. The authors of *Global Transformations: Politics, Economics, and Culture* have identified three major positions.¹¹ First, the *hyperglobalists* who stress the displacement of national economies by transnational production, trade, and financial networks, operating in an increasingly liberal global market order.¹² Second, the *sceptics* who doubt whether the economic evidence shows any real increase in international economic activity as compared with the period up to 1914 or that production chains are as global as some have asserted.¹³ Third, the *transformationalists* who see the levels of transnational economic integration as unprecedented, and who feel that globalisation is giving rise to a fundamental restructuring of power in a world where there is no longer a clear distinction between local, national, or international affairs. However, they do not share the hyperglobalist's view that this is leading inexorably towards a global, free market. On the other hand, both positions see the essence of globalisation as lying in the concept of *supra-territoriality*—the development of transworld or transborder

7. For example, the local adoption of globalised cultural activities, such as the playing of global sports or the consumption of universally available fast foods, and the globalisation of local customs and products, such as the global trade in local cultural artefacts and the development of multiculturalism.

8. See, e.g., ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* (Polity Press 1998); MALCOLM WATERS *GLOBALIZATION* (Routledge 1995); LESLIE SKLAIR, *SOCIOLOGY OF THE GLOBAL SYSTEM* (Harvester Wheatsheaf, 2d ed. 1995); and LESLIE SKLAIR, *THE TRANSNATIONAL CAPITALIST CLASS* (Blackwell Publishers 2001).

9. See SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (Cambridge Univ. Press 1996).

10. Martin Wolf, *Will the Nation-State Survive Globalization?* 80 *FOREIGN AFF.* 178, 189–90 (Jan./Feb. 2001).

11. HELD, *supra* note 4, at 2–10.

12. See KENICHI OHMAE, *THE END OF THE NATION STATE* (Free Press 1995).

13. See PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION* (Polity Press, 2d ed. 1999). Held et al. dispute the empirical basis of Hirst and Thompson's thesis, arguing that the changes in productive processes that MNEs have instituted do enhance the structural power of corporate capital at the expense of the nation-state creating new issues of governance. See HELD, *supra* note 4, at 281–82.

connections—which brings to an end a purely territorial approach to social and economic geography.¹⁴ This does not imply that territory is irrelevant, but that certain processes need no longer be rooted in a specific territory.

A further distinction should be drawn between those who see globalisation as a real phenomenon, whether they agree with the hyperglobalist faith in global free markets or not (as in the case of the so called anti-globalisation movement)—the *globalists*—and those who deny the reality of globalisation—the *anti-globalists*.¹⁵ Views belonging to the latter group can range from the above-mentioned sceptics, who assert that globalisation is a myth generated to support neo-liberal policies, aimed at the deregulation of trade, investment and financial flows, to outright nationalists, or religious fundamentalists, who reject the very notion of an integrating global economy as a good thing.¹⁶

It is worth mentioning two further approaches, which may form a possible third group of protagonists, who might be termed the *prophets of post-globalisation*. What this third group has in common is an acceptance of the reality of globalisation, coupled with a sense that this process may, in due course, be reversed. It is here that theories of what Samuel Huntington calls the *Clash of Civilisations* and what Lester Thurow has referred to as the *Plate Tectonics of Capitalism* might belong. The first foresees a dissection of the world into self-contained and increasingly conflictual cultural blocs, where religious and other cultural differences will regain ascendancy over the trend towards the so-called global culture foreseen by cultural globalists.¹⁷ The second suggests that globalisation leads to the end of economic hegemony on the part of a single nation-state—Britain in the 19th century and until now the United States (U.S.)—and is replaced by competition among regional economic and political blocs. This might lead to regional protectionism and retrenchment that can reverse the patterns of transnational economic and social interactions that are used to prove the existence of globalisation. Such a policy might also be easier to sell to the public if couched in appeals to cultural loyalties, which include religious, ethnic, national, and racial elements, and which, as Huntington warns, are still the most potent source of identification for the human race.

Finally, certain remaining important normative questions about globalisation need to be stated. As may be apparent from the foregoing discussion, there is a strong historical dimension to the debate. Clearly, some of the protagonists see globalisation as an old phenomenon, while others read it as essentially new and unprecedented. A related issue asks whether the emergent global society is in the final stages of modernity or whether it is post-modern, in the sense that globalisation brings about a fundamental change in perception that puts into question the philosophical tradition of rationality and the continuation of the nation-state as the bases for social organisation, both being essential elements in the mod-

14. SCHOLTE, *supra* note 1, at 46.

15. *Id.* at 17–18.

16. See CABLE, *supra* note 2, ch. 7. The ideas of the late Sir James Goldsmith, founder of the U.K. Referendum Party, perhaps come closest to exemplifying the nationalist perspective. See SIR JAMES GOLDSMITH, *THE TRAP* (Macmillan 1996). Equally, the politics of ethnic identity can act as a spur to anti-globalist perspectives. See, e.g., showing the effect of the rise of Islamic fundamentalism, ANKIE HOOGVELT, *GLOBALIZATION AND THE POSTCOLONIAL WORLD* ch. 9 (Palgrave, 2d ed. 2001).

17. Samuel P. Huntington, *The Clash of Civilisations*, 72 *FOREIGN AFF.* 22 (Summer 1993); see also SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILISATIONS AND THE REMAKING OF THE WORLD ORDER* (Simon & Schuster 1996); LESTER THUROW, *HEAD TO HEAD* (Nicholas Brealey Publishing, 1992) and *THE FUTURE OF CAPITALISM* (Nicholas Brealey Publishing, 1996).

ernist conception of Western society.¹⁸ Other important questions ask whether the emergent global society is more or less secure and/or risky, more or less equitable, more or less democratic. Indeed, as we shall see in the second part of this article, many of these questions are directly addressed by lawyers researching issues related to globalisation.

II. Is there a "Legal" Approach to "Globalisation"?

Relatively speaking, little has been written, either by lawyers or non-lawyers, specifically on the role of law in globalisation and the effect thereof upon our conceptions of law.¹⁹ It is true that lawyers do a great deal in fields relevant to globalisation, as testified by the parameters of actual legal practice and, at the academic level, by the range of courses available and books or articles published on specific topics such as, for example, international business law, European Union (EU) law, human rights, comparative law, public, and private international law. But these may be little more than studies of the policies, technical rules, and practical skills needed to conduct *international* interactions, whether between states, non-state actors, or both in an essentially *territorial* legal world. The question remains whether globalisation should generate new approaches to law and to legal research that go beyond such a strictly territorial conception of legal action and that may capture something new about law in a world that is increasingly characterised by globalisation.

The answer to that question shall be considered at two levels. First, the existing building blocks of legal experience with the institution, operation, and regulation of cross-border activities will be described. Second, attempts to go beyond such practical operational matters will be reviewed to see whether a new approach to law and globalisation is being, or could be, developed.

A. THE BUILDING BLOCKS

The relevant building blocks are the existing systems of legal thought that deal with issues of legal activity across borders and the contribution of practical legal experience with cross-border issues.

1. *Existing Systems of Legal Thought and Cross-Border Legal Activity*

The most significant areas of existing legal thought must, in the first instance, include: public international law, private international law or conflict of laws, and comparative law. These may be said to represent the fields that cover the legal issues arising out of the operation of the traditional international legal order. This is founded on the independent nation-state, whose sovereignty derives from its control over territory and whose legal status is equal to that of every other sovereign state, regardless of size or power.²⁰

Within this model, public international law caters to the need to regulate inter-governmental interactions, both in peace and war, whether these occur directly between

18. See SCHOLTE, *supra* note 1, at 25. See also BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* (Routledge 1995, see now 2nd ed., 2002, Butterworth and Co).

19. See Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, 5 EUR. L.J. 331 (1999). "The impact of globalisation has not been reflected equally in all fields of scholarship . . . Research on the relationship between globalisation and the law is of relatively recent vintage." *Id.*

20. See Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1017 (1996/97); H. WALDOCK, *BRIERLY'S LAW OF NATIONS*, ch. 1 (Oxford Univ. Press, 6th ed. 1963).

two or more States or through intergovernmental organisations. As such, this branch of law operates beyond the territory of one country, in that it applies to all countries simultaneously. However, it still clearly regulates activities that have a *territorial* connection such as, for example, the delimitation of State boundaries on land, sea, and air or the regulation of diplomatic relations, including the protection of diplomatic premises and personnel from local legal jurisdiction. On the other hand, the existence of intergovernmental organisations (IGOs) may be said to challenge this perspective. IGOs are organised around the constitutive instrument establishing the organisation to which the Member States have consented. They have an existence rooted in the sovereign acts of States, but they exist over and outside those States. Equally, each IGO creates a legal sub-system based on its constituent instrument, which, in turn, will also be governed by a sub-system of public international law, the law of international institutions.²¹ Furthermore, an IGO may have a quasi-legislative power to develop substantive international rules and procedures governing its substantive field of activity. This specialised legal order may be said to constitute a tool for the pragmatic development of responses to the regulation of the phenomena of globalisation.

By contrast, private international law caters to the need to resolve disputes between non-state actors (both natural persons and corporations) that contain a cross-border element. It can be safely said that the essential legal recognition of the *territoriality* of law lies in private international law. This can be illustrated by the three main issues that this field covers.²² First, it offers rules and procedures whereby conflicts of national laws, which arise in the course of regulating economic transactions and other activities that cross borders, can be resolved. Secondly, it guides the courts as to when it is possible to have jurisdiction over actions that occur outside the territorial reach of the forum in question.²³ Finally, private international law must also determine whether a judgment given by the courts or tribunals of one jurisdiction can be recognised and enforced by those of the forum jurisdiction in which these legal results are sought. Clearly, so long as law retains its essentially territorial character, such questions will arise and will need to be resolved.

Comparative law is more difficult to pinpoint. Ostensibly, this branch of legal research concerns the comparison of how different legal systems deal with apparently similar issues. Perhaps the major need served by this process is the satisfaction of rising curiosity about how other legal systems work. That may, in part, be motivated by the increasingly close interactions of national legal systems as a result of increased numbers of cross-border interactions, greater ease of obtaining legal information about other legal systems, and the pull of new institutional arrangements that aim at greater integration between states and, as a result, between their legal systems. The EU is the best example. However, on closer analysis, such a representation of comparative law misses the real issues. As Pierre Legrand has pointed out, is it ever possible actually to compare in any meaningful way different legal approaches to the solution of certain problems given the difficulty of identifying similar

21. PHILLIPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* 17 (Sweet & Maxwell, 5th ed. 2001).

22. P. M. NORTH & J. J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW*, ch. 1 (Butterworths, 13th ed. 1999).

23. Such issues have arisen in practice *inter alia* as a direct result of increasing internationalisation of distribution and production by MNEs. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* (Blackwell Publishers 1999), especially chapter 5; Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case*, 50 INT'L & COMP. L.Q. 1 (2001).

legal issues in diverse societies and cultures or of being certain that legal concepts are actually translatable from one culture to another?²⁴ Such problems have led to the view that comparative law is either methodologically suspect, or quite possibly useless, or that it needs a better theoretical underpinning. Following the latter view, William Twining, in his recent book *Globalisation and Law*, believes that globalisation requires "a revival of general jurisprudence and a rethinking of comparative law from a global perspective as key elements in cosmopolitan legal studies."²⁵ This will involve all the main tasks of legal theory with the goal of building up a total picture of law-in-the-world.²⁶ What this means is a little unclear. Given its enormity and methodological complexity, it is doubtful whether this goal can ever be achieved. Equally, if the process leads to discovering and analysing the actual differences between legal cultures, then the result may be, as Legrand suggests, an emphasis on difference, not similarity.²⁷

2. *Pragmatic Developments in Law and Legal Practices*

Turning to practical legal developments, it is fair to say that lawyers and other professionals have been active for a long time in helping to create legal responses to new phenomena that occur across borders.²⁸ A good example of such cross-border legal regime building at the non-state level arises in the field of commercial regulation. Three examples will suffice.

First, so as to ensure certainty and predictability in international commercial agreements, harmonised clauses for use in such agreements have evolved. These may arise as a result of the codification of common practices into standard terms by an international commercial, trade, or industry organisation.²⁹ Alternatively, harmonisation may be achieved by the international adoption of the practices of the leading national market actors in a particular field, such as, for example, the widespread use of the English Lloyds SG policy and its successors in marine insurance. Indeed, the SG policy was itself given the recognition of official law when it was incorporated by Schedule into the Marine Insurance Act 1906.³⁰

Second, where no formal regulation, or informal commercial practice, yet exists to deal with a particular problem, lawyers and other professionals may work out a solution based on agreement between the parties involved, which is subsequently given legal recognition before the courts of the countries where the problem has to be resolved. Such an approach is used, for example, in relation to the resolution of transnational insolvency cases.³¹

24. Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUD.* 232 (1996). See also Geoffrey Samuel, *Comparative Law as a Core Subject*, 21 *LEGAL STUD.* 444 (2001); Geoffrey Samuel, *Comparative Law and Jurisprudence*, 47 *INT'L COMP. L.Q.* 817 (1998); Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 *INT'L COMP. L.Q.* 495 (1998).

25. WILLIAM L. TWINING, *GLOBALISATION AND LEGAL THEORY* 189 (Butterworths 2000).

26. *Id.* at 190.

27. Legrand, *supra* note 24, at 240.

28. Sol Picciotto, *The Regulatory Criss-Cross: Interaction between Jurisdictions and The Construction of Global Regulatory Networks*, in *INTERNATIONAL REGULATORY COMPETITION AND COORDINATION* 89 (William Bratton et al. eds., Clarendon Press 1996).

29. Perhaps the leading example is the standard terms for international sales known as INCOTERMS, which were developed by the International Chamber of Commerce. See LEO D'ARCY ET AL., *SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE*, ch. 2, 32 (Sweet & Maxwell, 10th ed., 2000).

30. Peter T. Muchlinski, *Global Bukowina Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community*, in *GLOBAL LAW WITHOUT A STATE* 79, 86 (Gunther Teubner ed., 1997).

31. See John Flood & Eleni Skordaki, *Normative Bricolage: Informal Rule-Making by Accountants and Lawyers in Mega-Insolvencies*, in *GLOBAL LAW WITHOUT A STATE* 109 (Gunther Teubner ed., 1997).

Third, where disputes arise over the interpretation and/or application of international commercial agreements, the parties may decide to resolve their dispute by way of delocalised international arbitration, rather than by reference to purely national dispute settlement systems. This approach has been frequently used in relation to disputes arising out of international investment agreements.³²

A second significant area of development has been the evolution of "supranational law" in regional organisations such as the EU. This legal order is neither international law, although it governs relations between sovereign Member States that are subjects of international law, or national law, even though it inhabits a clearly defined geographical and jurisdictional territory. It rests somewhere between the two. It asserts supremacy over national law in those areas where the EU has exclusive competence, though this is based on a grant of sovereign power by the Member States. In this sense EU law can be seen, to use Professor Scholte's term, as a supra-territorial order. On the other hand, this reorganisation of sovereign power is specific and contingent: it extends only to those fields where the Member States have agreed that it should extend, and it is contingent in that the Member States can always reconsider the grant of power by mutual agreement. Indeed, with the inclusion of the principle of subsidiarity in Article 5 (ex Article 3b) of the European Community (EC) Treaty, in those areas where the Community does not have exclusive competence, the Member States have the first right to act and the Community can only intervene where the objectives of the proposed action cannot be sufficiently achieved by the Member States acting alone. Thus the EU legal order remains firmly under the control of its membership at least as regards its scope of operation.

A third significant development has been the creation of new substantive subjects in international law through the actions of international conferences, resulting in multilateral agreements, and through the quasi-legislative activities of IGOs. The best example is the development of international human rights law since World War II, and the evolution of minimum international labour standards through the work of the ILO and other regional and multilateral organisations.³³ Others include international environmental law and international economic law.³⁴

A fourth related development has involved the creation of new legal fields that integrate international, regional, and national law. The most obvious example is the law relating to the regulation of international business dealing with trade and investment and international financial transactions.³⁵

32. See Muchlinski, *supra* note 30, at 88; and M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 52 (Grotius Publications 1994). See also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (Chicago Univ. Press 1996).

33. Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735 (1999); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *EMPLOYMENT*, U.N. Doc. UNCTAD/ITE/IT/19, U.N. Sales No. E.00.I.I.D. 15 (2000).

34. See generally DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* (Institute for Int'l Economics 1994); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (Routledge, 2d ed. 1999).

35. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (Cambridge Univ. Press 2000); MUCHLINSKI, *supra* note 23; D'ARCY ET AL., *supra* note 29; DOUGLAS ARNER ET AL., *INTERNATIONAL FINANCIAL SECTOR REFORM STANDARD SETTING AND INFRASTRUCTURE DEVELOPMENT* (Kluwer Law Int'l 2002).

B. TOWARD A NEW METHODOLOGY OF LAW AND GLOBALISATION?

Arguably, the various developments described above do not go beyond traditional legal disciplines and methods because they do no more than adapt existing principles of international and national law to create regulatory solutions to international policy issues and to guide dispute settlement before both national and international bodies. On the other hand, a new type of legal order and methodology may be created. In particular, the cross-border activities by non-state actors, coupled with the relocation of certain regulatory functions outside the traditional domain of the territorial nation-state toward regional and multilateral organisations, have cast doubt on exclusively territorial theories of legal order and sovereignty. Furthermore, those responses often involve informal or unofficial regulatory orders based on such things as business practices, shared communal values, and professional perceptions of problems and their solution, which all give rise to order outside official law.

These factors have led to developments in legal research along a number of identifiable and complementary lines. First, approaches that seek to create a new alignment between state sovereignty and other sources of sovereign power in evolving regional and global institutions, what we could call *revisionist approaches to state and legal sovereignty*. These approaches clearly draw on political science perspectives that question the continuing validity of a world order based on independent sovereign states, but they can vary in intensity between hyperglobalist and transformationalist positions, depending on the perceptions of the author in question.

Second, there are approaches that build on the possibility of new legal orders developing beyond the sovereign state through the activities of significant non-state actors and groups, what we may call *supra-territorial legal approaches*. These include approaches based on systems theory and post-modernist reconsiderations of legal rationality and state forms in the light of globalisation. These approaches have some apparent similarities with the transformationalist theories of globalisation mentioned above.

Third, there are approaches that build on the spatial organisation of regulation in the global system and that consider that globalisation, particularly in its economic dimensions, can generate new kinds of *legal pluralism in globalisation*. Each approach will now be briefly reviewed.

1. *Revisionist Approaches to State and Legal Sovereignty*

These approaches cover at least three main issues: first, the relationship between law and territory as the traditional building block of state sovereignty and national legal order; second, the relationship between law and economic power in the emergent global economy; and third, how to preserve and further human dignity and democratic accountability in the emergent global economy and society.

Turning to the first issue, globalisation is seen as de-centering national law in two directions. The first is downwards through an increasing localisation of legal activity through principles of subsidiarity or devolution.³⁶ The second is upwards towards delocalisation of legal activity through supranational regulation that has either direct or indirect effect on legal rights and duties in national law, as through the operation of supranational regional

36. Joanne Scott, *Law, Legitimacy and EC Governance: Prospects for "Partnership,"* 36 J. COMMON MKT. STUD. 175 (1998).

law or through normative developments in intergovernmental institutions.³⁷ These changes may be said to have profound effects on the distribution of sovereign power and legal authority across numerous levels of regulatory jurisdictions.

Indeed, the authority to regulate may be divided between any and every one of these levels: the local community, the town or borough, the county, the city, the sub-federal state (where applicable), the national (or federal) government, the regional organisation, and the multilateral organisation. The location of regulatory authority may be the result of pragmatic choices made by the state as to the most effective level of regulation and/or of lobbying influences by relevant actors, both state and non-state. What is certain is that, as Neil McCormick has pointed out, "there is no compulsion to regard 'sovereignty,' or even hierarchical relationships of superordination and subordination, as necessary to our understanding of legal order in the complex interaction of overlapping legalities."³⁸

Furthermore, the model of the unitary, independent sovereign state, acting as the complete repository of law and order, becomes increasingly inadequate as an explanation of emergent global regulation, especially because of activities that, by their nature, cannot be confined to the territorial borders of the nation-state. These activities require an understanding of cross-jurisdictional regulation such as when states try to affect regulation unilaterally through extraterritorial exercises of regulatory power, bilaterally through agreements with other states, or collectively through regional and multilateral organisations. Equally, the development of informal regulatory networks of professionals and other experts seeking solutions to cross-border problems must be taken into account.³⁹

The second and third issues follow directly from the decentralization of the nation-state. In particular, this perception has generated fears that unaccountable private economic power possessed by MNEs, along with similarly unaccountable public power exercised by undemocratic IGOs and by informal international policy-making networks, will serve to defeat the democratic process in nation-states themselves. The fear is that national constitutional orders, created to deal with issues of legitimacy and accountability at the historical stage of national economic and social integration, will be bypassed at the international level.⁴⁰ This process may also have been enhanced by the recent trends towards privatisation of state functions, market liberalisation and deregulation that are characteristic of the New Economy state.⁴¹ In response, there is now a growing interest in the question of how to make these three groups of entities more accountable. It has given rise to what is possibly

37. PETER T. MUCHLINSKI, *International Business Regulation: An Ethical Discourse in the Making*, in T. CAMPBELL & S. MILLER, *HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS* (forthcoming Cambridge Univ. Press 2003); DAMIAN CHALMERS, *Post-nationalism and the Quest for Constitutional Substitutes*, 27 J. of Legal Studies 178 (2000).

38. Neil McCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1, 10 (1993).

39. See generally Picciotto, *supra* note 20; and Sol Picciotto, *Fragmented States and International Rules of Law*, 6 SOCIAL & LEGAL STUDIES 259 (1997). See also Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 521 (George A. Bermann et al. eds. (Oxford Univ. Press 2000) (warning against an excessive fear of such networks as a threat to democracy). One important transnational network may be the judiciary; see Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, in HUMAN RIGHTS AND LEGAL THEORY: ESSAYS IN HONOUR OF BRIAN SIMPSON 29 (Katherine O'Donovan & Gerry Rubin, eds. Oxford Univ. Press, 2000).

40. James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 MOD. L. REV. 204 (2002).

41. See generally JOANNE CONAGHAN, *LABOUR LAW AND THE "NEW ECONOMY" DISCOURSE* (forthcoming 2003).

the most ambitious work to date on this issue, Braithwaite's and Drahos' *Global Business Regulation*.⁴²

The authors present a complex methodology that allows us to see the full range of interactions contributing to the development of global regulatory norms and practices. Having identified the principal significant actors,⁴³ they go on to distinguish between the traditional concept of the rule of law, with its seemingly impartial emphasis on individual autonomy of action in the context of rules enacted by a neutral state, and what they term the rule of principles, which informs the reality of international business regulation through the continuing contest between competing principles upon which the conduct of such business should be based. The authors do so to avoid what they see as the false objectivity of rule of law analysis, pointing out that this doctrine, when applied in the international business sphere, is used as an instrumental tool for the furtherance of a neo-liberal version of freedom.⁴⁴

The authors then consider the mechanisms of globalisation, of which modelling is seen as the most important. It rests on, observational learning with a symbolic content, not just the simple response of mimicry implied by the term "imitation," and on conceptions of action portrayed in words and images.⁴⁵ The main function of modelling is to spread specific types of regulatory regimes by using models for wider adoption. This can occur through coercion, as in the case of the spread of Western notions of property, contract, and legal order through the process of colonialism, or it can occur through webs of dialogue and persuasion.⁴⁶ In particular, the authors argue that concerned non-governmental organisations (NGOs) can, through the use of alternative policy models, shift the debate away from industry specific concerns toward a more socially responsive agenda from the perspective of what they term popular sovereignty which, they feel, still remains a powerful source of opinion even where national and parliamentary sovereignties may be weakened by globalisation.⁴⁷

Braithwaite and Drahos provide an analytical model that owes much to the social action programmes and strategies followed, in the recent past, by the feminist and environmental movements and, to a lesser extent, by the consumer movement. They also offer an aspiration that through the process of dialogue, persuasion, and conflicts of principles, and based on the use of oppositional regulatory models, a more democratically formed system of international business regulation will emerge.⁴⁸ However, one is left with the feeling that this

42. BRAITHWAITE & DRAHOS, *supra* note 35.

43. *Id.* at ch. 20. These include: the nation-state, which has hitherto been the most important actor but is now being decentred; intergovernmental organisations, whose influence varies according to how the dominant powers — the U.S. in particular — perceive them; business itself through lobbying efforts; individuals who have significant personal influence arising from their positions as leaders of corporations or industries, or as leading intellectuals or activists; and NGOs and mass publics as repositories of popular views on matters germane to business regulation and epistemic communities of experts who, through their interactions *inter se* and with other types of actors, can create dialogues from which policies, and policy consensus, can emerge. *Id.*

44. *Id.* at 531. For the contrary position advocating a liberal international rule of law in the regulation of international economic activity, aimed at the control of state power in relation to the economic freedoms of other states and non-state actors. See John Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1. (1998).

45. *Id.* at 580.

46. *Id.* at ch. 23.

47. *Id.* at ch. 26.

48. In a similar vein, see the discussions of deliberative democracy in TRANSATLANTIC REGULATORY COOPERATION, *supra* note 39, by Howse, at 478–80; and Picciotto, at 495. For the potential of the Internet as a

approach assumes so much that is absent in many of the countries engaged in the process of economic globalisation. In particular, the effectiveness of the modelling principles must surely depend on: a relatively good level of general education; access to relevant information; access to the media, especially for weaker groups; a liberal and tolerant political order; and finally, educational and campaigning institutions that are sufficiently free and unbiased that they can become credible sources of alternative policy making. Such conditions may only exist in the Western liberal democracies, and even here this model may be doubted. Thus, while this approach offers much in terms of emphasising the range of variables that an understanding of emerging global business regulation requires, it begs the very question as to how we are to ensure the preservation and furtherance of human dignity as the social counterpart to the processes of economic globalisation.

In this regard, the law relating to human rights has played a central part. Traditionally, this area has developed to deal with human rights abuses at the hands of the nation-state.⁴⁹ Few would doubt that this issue continues to be of central importance, given that the state is not disappearing when it comes to the coercion of individuals and groups, even in more democratic states, as the issue of immigration and asylum suggests. However, a recent trend has emerged to view human rights law as a system that might be capable of creating a new global constitutional law rendering not only nation-states, but also IGOs⁵⁰ and non-state actors, particularly MNEs, accountable for the observance and furtherance of human rights standards.⁵¹

Appeals to human rights standards as the basis for determining the ethical dimension of corporate, IGO—and, to be sure, host state—conduct in the economic sphere, have come under sustained attack from a relativist perspective.⁵² An appeal to relativism can be used to develop an argument that using human rights standards in the assessment of working and social conditions is a form of cultural imperialism and protectionism that ignores the very real problems of development in a post-colonial setting.⁵³ However, the evolution of international human rights standards might produce the opposite of the cultural relativism argument, because it may facilitate the process of liberal reform in countries where reactionary values continue in legal provisions but where popular beliefs increasingly oppose their content. In some cases “universalism” will be the dominant position. Thus, for example, when the government of Tasmania chose to repeal laws that rendered homosexual acts between consenting adults illegal in 1997, it did so as a result of pressure put upon it by the outcome of a case taken by gay and lesbian rights activists to the U.N. Human Rights

tool for furthering deliberative democracy, see Peter Strauss, *The Challenges of Globally Accessible Process*, in TRANSATLANTIC REGULATORY COOPERATION, *supra* note 39, at 547.

49. Indeed, this perspective continues to be significant in approaches advocating an international rule of law in the conduct of international economic activity. Thus Petersmann advocates the preservation of economic freedom through the creation, by the WTO, of directly effective fundamental economic rights of which a human right to free trade is a central pillar. See Ernet-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify their Inter-relationships*, 4 J. INT'L ECON. L. 3 (2001). For a critical appraisal, see MUCHLINSKI, *supra* note 37.

50. See also SIGRUN SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (Cavendish Publishing 2001).

51. See McCorquodale & Fairbrother, *supra* note 33; Peter T. Muchlinski, *Human Rights and Multinationals — Is There a Problem?* 77 INT'L AFF. 31 (2001). See also DE SOUSA SANTOS, *supra* note 18, at ch. 4.

52. For a useful discussion, see DE SOUSA SANTOS, *supra* note 18, at 337–53. See also MUCHLINSKI, *supra* note 37.

53. See DE SOUSA SANTOS, *supra* note 18, at 354–56 (describing the development of human rights trade-off).

Committee (HRC) under the International Covenant on Civil and Political Rights (ICCPR).⁵⁴ The Australian Federal Government, which is responsible for the conduct of Australian foreign policy, accepted the jurisdiction of the HRC in 1991 as part of its wider policy to show Australia's commitment to international human rights norms. This entitled Australian citizens to bring cases before the HRC. On the day that this jurisdiction came into effect, the Tasmanian Gay and Lesbian Rights Group (the Group) lodged a communication with the HRC alleging *inter alia* that the Tasmanian law violated Australia's obligations under the ICCPR to respect privacy and equality rights. The HRC determined that this was the effect of the Tasmanian law. As the only respondent in the case, the Australian Government largely accepted the Group's claim, given that the law in all other states and territories of Australia had already decriminalised such acts in accordance with federal legislation. The Tasmanian Government, as a state in the Commonwealth of Australia, had no standing before the HRC, though its submissions concerning the cultural reasons present in Tasmania for the maintenance of the law against homosexual acts were put to the HRC. In the light of such criticism at the international, federal, and social levels, Tasmania could no longer hold out and, furthermore, could not invoke its constitutional rights to legislate over social policy to trump its Federal government's human rights policy in the field of sexual activities.

It could be argued that this outcome, occurring as it did in a western country, does no more than re-affirm a western liberal commitment to sexual tolerance, one that finds its way into the interpretation of the western inspired ICCPR. However, this argument would disregard the fact that the U.N. is a global organisation representing virtually *all* the states of the world. On the other hand, it does not answer the question as to what should happen if the consensus around the world was that homosexual acts are an abomination and must be repressed. In this the globalisation of human rights values through legal action may prove to be very problematic.⁵⁵

2. *Supra-Territorial Legal Approaches*

Possibly the first attempt to recast law as a supra-territorial order came with the development, by international business lawyers, of the concept of "Transnational Law." This term, first coined by Judge Philip C. Jessup in 1956, has been used to denote an approach to finding the governing law of an international transaction by reference to a combination of national, regional, and international law sources, so as to arrive at a consensual image of the laws and practices that usually apply to the transaction in question.⁵⁶ It thus frees the transaction from being formally related to a single legal system but, rather, to pragmatic norms through which cross-border commercial transactions can be regulated to the benefit of effective commercial exchange.

This approach has also been referred to as the new *lex mercatoria* by some authors, including Clive Schmitthoff, a tribute to the medieval *Lex Mercatoria*, which means "Law Merchant," a body of universally accepted practices and understandings that was used by medieval and early modern traders to settle their disputes wherever these happened to

54. Carl F. Stychin, *Relatively universal: globalisation, rights discourse and the evolution of Australian sexual and national identities*. 18 LEGAL STUD. 534 (1998).

55. See also COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS* (Hart Publishing 2000); UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (Oxford Univ. Press 2002).

56. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 106 (Yale Univ. Press 1956).

arise.⁵⁷ The existence, or otherwise, of the new *lex mercatoria* has given rise to an extensive debate, a full analysis of which is not necessary for present purposes.⁵⁸ What must be noted is that this concept forms an important building block for certain discussions which assert the existence of a global law that goes beyond traditional state-centred legal orders and provides evidence of legal globalisation.

For example, according to Gunther Teubner, globalisation is creating a global proto-law that is to be found beyond the positive law of the nation-state or of international law, in order maintenance systems that are unconnected with any particular territory. These systems exist wherever networks or groups operate across borders and create their own system specific internal proto-legal orders.⁵⁹

The new *lex mercatoria* is illustrative of such an order, it being a system that develops new contract regimes and dispute settlement systems outside formal state laws. Another order might be the internal management systems of multinationals that may be used to determine the resolution of internal disputes and issues without reference to outside laws.⁶⁰ Beyond the economic sphere other such orders may be found in, for example, the globalised discourse on human rights or in the increasingly global educational sphere.⁶¹ The key to this new level of law is its distance from the existing centres of law-making—national parliaments, global legislative institutions and intergovernmental agreements.⁶² In Teubner's own words, "[t]he new world law is primarily peripheral, spontaneous and social law. Private government, private regulation, and private justice are becoming central sources of law."⁶³

A similar empirical foundation has been used by Boaventura De Sousa Santos in his seminal work on globalisation and the creation of post-modern legal relations.⁶⁴ Like Teubner, De Sousa Santos also accepts that formal state-centred law is being supplemented by new informal legal orders ranging from the practices of Brazilian urban squatters to those of global business groups.⁶⁵ Equally, the traditional distinction between the state and civil society, which is the distinction between the public and private sphere must be abandoned when developing new tools to assess the effects of the emergent world capitalist system.⁶⁶ Furthermore, the rise of global human rights may be creating a new cosmopolitan moral law.⁶⁷ Thus, for De Sousa Santos, globalisation is leading towards a recasting of legal theory

57. For the historical background, see Leon E. Trackman, *The Evolution of the Law of the Merchant: Our Commercial Heritage Part I*, 12 J. MAR. L. & COM. 1 (1980); *Part II*: 12 J. MAR. L. & COM. 153 (1981).

58. For a useful general discussion, see Abul F. M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?* 14 AM. U. INT'L L. REV. 657 (1999). See also Teubner, *supra* note 30, at 3, and Hans-Joachim Mertens, in Teubner (ed.), *supra* note 30, at 31. For a critique of the concept as being a construct of western commercial lawyers seeking to impose their preferred rules on host countries to foreign capital, see DEZALAY & GARTH, *supra* note 32.

59. Teubner, *supra* note 30.

60. See Muchlinski, *supra* note 30 and Jean Phillipe Robbe in Teubner (ed.) *supra* note 30, at 45.

61. See GUNTHER TEUBNER, *Global Private Regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?* GLOBALISATION AND PUBLIC GOVERNANCE (forthcoming 2000).

62. *Id.* at 3.

63. *Id.* at 4.

64. DE SOUSA SANTOS, *supra* note 18, at ch. 4. For a valuable summary and critical assessment of this difficult work, see TWining, *supra* note 25, at ch. 8.

65. Thus De Sousa Santos also cites *inter alia* the new *lex mercatoria* and the emergence of global human rights issues as evidence of legal globalisation; DE SOUSA SANTOS, *supra* note 18, at 289–94, 337–65.

66. See also ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (Clarendon Press 1993).

67. See *supra* notes 52–55.

in which the state is no longer a central pillar, though not a defunct element. The challenge is to develop an understanding of law that allows us better to see its precise *location*.

In order to achieve this goal, De Sousa Santos offers an innovative methodology based on analogies drawn from cartography.⁶⁸ He argues that laws are literally maps because both are ruled distortions of reality, organised misreadings of territories that create credible illusions of correspondence.⁶⁹ Just as maps create symbolic and scaled projections of spatial reality, so laws create a symbolic and scaled projection of social reality. Thus laws can be organised in relation to scale through the sequence of local, national and transnational legality. Laws can be projected from a centre to a periphery through the export of concepts and techniques, as well as ideological configurations that are organised in the centre and exported to the periphery.⁷⁰

Equally certain legal forms, such as the new *lex mercatoria*, are seen by De Sousa Santos as being based in what he terms "egocentric legality" in that they create a transnational legal space that often conflicts with the "geocentric legality" of the nation-state. Thus the new *lex mercatoria* has this quality because it applies to a contract or to a delocalised arbitration used by international private economic agents and may transcend, through this process, the national legal space.⁷¹ Finally, law may be symbolic because it may create solemn moments, such as the conclusion of a contract or the decision of a legal dispute, or create emotive symbols such as the reference to common trust in transnational legal practices of which, perhaps, the appeal to human dignity inherent in human rights norms is a good example.

De Sousa Santos's use of cartographic analogies is suggestive but ultimately unsatisfying. It is difficult to see how this approach advances our understanding beyond knowing that different levels of regulation, which do not necessarily need to involve positive rules of state-made law, contribute to social order. Furthermore, the juxtaposition of egocentric and geocentric legal orders adds little to the fact of the existence of such proto-legal orders, though it suggests differing levels of generality in their acceptance and operation. Moreover, his analysis does not do justice to the emergence of new supra-territorial orders of regulation created by IGOs, especially the multilateral trading system centred on the World Trade Organization (WTO). How is this to be mapped? Finally, as William Twining has pointed out, the mapping of laws may be seen as a useful tool in comparative legal analysis. Indeed, he himself has attempted to map laws so as to trace the spatial spread of legal concepts and orders.⁷² However, he concludes that this exercise is ultimately futile because it depends on how one defines the legal family to which the concept being traced belongs, and this is, as noted above, a very difficult conceptual issue in itself.⁷³

3. Globalisation and Legal Pluralism

A theme that is acknowledged throughout the legal literature of law and globalisation is that of legal pluralism. This concept owes its origin to the study of legal relations in colonial

68. See DE SOUSA SANTOS, *supra* note 18, at ch. 7. *Law a Map of Misreading*, also published earlier in 14 *Journal of Legal Studies* 279 (1987).

69. *Id.* at 458.

70. *Id.* at 467. This is similar to the idea of legal transplants used by Braithwaite and Drahos.

71. *Id.* at 469.

72. TWINING, *supra* note 25, at 136–52.

73. *Id.* at 152.

societies.⁷⁴ Such societies created a pattern of legal organisation in which the modern law of the colonial power had to maintain its dominance over traditional systems of order maintenance, whether these involved recognised systems of law, such as Islamic or Hindu law, informal systems of customary law, or other order maintenance systems. In order to ensure that this happened, colonial law had to develop methods whereby the traditional practices could be recognised and the limits of their effective application be defined so as to preserve the *plurality* of legal orders by which the colonial legal order operated.⁷⁵

It is fair to say that the colonial origins of this concept are not very prominent in many of the accounts of globalisation already mentioned. Thus, what De Sousa Santos calls “interlegality” and Teubner refers to as “global legal pluralism” is used in its more recent guise as a socio-legal concept, stressing the concurrent operation of multiple orders of law on cross-border transactions. These views appear to ignore the earlier development of “legal pluralism” as a concept of social control through law in a non-democratic colonial context, in which even the very idea of “customary law,” peculiar to indigenous peoples, was often an invention of colonial legal experts as a device of segregation and repression.

A distinctive approach to legal pluralism and globalisation has been developed by Francis Snyder.⁷⁶ While he does not lay claim to identifying any oppressive or exploitative processes in the course of his account, there is little doubt that such questions are at least implicit in his use of legal pluralism. Using the same source methodology as Dicken, Snyder identifies transnational production and retailing chains organised by MNEs as the basic empirical evidence of economic globalisation.⁷⁷ He uses the term global legal pluralism in contradistinction to the use of the same term by Teubner. Snyder is critical of Teubner’s approach on several counts. He feels that the emphasis on the new *lex mercatoria* as the illustrative case has the effect of overemphasising the importance of contract and soft law in the development of global legal phenomena and an underestimation of the continuing importance of the state as a source of global law.⁷⁸ This leads Teubner into the further difficulty of being unable to take account of IGOs and regional organisations as sources of global law in their turn. Indeed they are simply ignored.

By contrast Snyder sees global legal pluralism as encompassing a range of structural sites which include, “a variety of institutions, norms and dispute resolution processes located and produced at different structured sites around the world.”⁷⁹ He contemplates non-state, state, supranational, and multilateral law creating entities within his definition of sites. Second, Snyder sees the relations between these sites as being varied in both structure and process. Thus sites may be, “autonomous and even independent, part of the same or different regimes, part of a single system of multi-level governance, or otherwise interconnected.”⁸⁰ The important thing is that these sites interact with global economic networks

74. For a useful short account of the history of legal pluralism, see TWINING, *supra* note 25, at 224–28.

75. See M. BARRY HOOKER, *LEGAL PLURALISM* (Oxford Univ. Press 1975); PETER FITZPATRICK, *LAW AND STATE IN PAPUA NEW GUINEA* (Academic Press 1980); FRANCIS G. SNYDER, *CAPITALISM AND LEGAL CHANGE* (Academic Press 1981).

76. Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and EU Law*, in *REGIONAL AND GLOBAL REGULATION OF INTERNATIONAL TRADE I* (Hart Publishing, 2002).

77. Gary Gereffi, *The Organisation of Buyer-Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks*, in *COMMODITY CHAINS AND GLOBAL CAPITALISM* 95 (Greenwood 1994).

78. That is, rules that have a moral force, but are not contained in positive law. Snyder, *supra* note 76, at 10.

79. *Id.*

80. *Id.* at 11.

to create the global playing field on which regulation occurs. Thus, "[g]lobal legal pluralism does more . . . than simply provide the rules of the game; it also constitutes the game itself, including the players."⁸¹

This approach allows us to see the process of global regulation in a more diversified context than that offered by Teubner. In particular it does not diminish the significance of existing *territorial*, in addition to *supra-territorial*, sources of legal rules and practices as an input into legal globalisation. Furthermore, it allows us to consider the power relations between the principal players and the sites of global legal pluralism by stressing the interactions between them. Though Snyder does not go so far as to say that the network of legal rules and practices that governs a given global commodity chain will reflect the structure of authority and power in that chain,⁸² there is nonetheless the capacity to use his approach as a vehicle for the study of power relations in the process of global legal governance.

III. Conclusions

The foregoing discussion has covered a great deal of ground. It can do little more than act as a road-map to the space covered by law and globalisation. However, certain tentative conclusions can be drawn as to the future development of this field. First, it would be very unwise to abandon the view that law is essentially a *territorial* phenomenon, notwithstanding the tendency in social science and legal literature to stress the supra-territorial character of globalisation as evidenced by the growth of global business chains, informal orders of self-regulation, and the alleged resultant decline of the nation-state. Indeed, the evidence for this is tentative. Much depends on the industry or sector that is used to offer evidence of global economic integration and the decline of traditional state authority. The new *lex mercatoria* is after all the product of the international business community alone. What can it tell us about, say, the environmental movement and its impact on global proto-law? Furthermore, how can we explain that in certain fields state regulation is as strong as ever? Apart from immigration, already mentioned above, labour law is another essentially state regulated area, even despite the great advances in international minimum standards.⁸³ This can be explained by the fact that national regulation makes sense given the existence of significant cultural differences in the treatment of labour and because it may well be in the interests of global capital to maintain differences in labour standards so as to encourage differences in labour costs. Here the continuation of segregated state-based regulation may be predicted.

Two other favourites as evidence of the increasing de-territorialisation of the state and law are the global financial system and the Internet. However, neither can point conclusively to the "end of the state as we know it" or to the emergence of a truly de-territorialised economy and society governed by a non-territorial form of law. Finance houses and financial experts have to live and work somewhere, and they tend to do so in global centres where financial services are a lead industry in the so-called global cities of New York, London, Frankfurt, or Tokyo.⁸⁴ These cities are also usually highly regulated by the law of the host

81. *Id.*

82. *Id.* at 45.

83. Harry Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 273 (Hart Publishing 2001).

84. See Saskia Sassen, *GLOBALIZATION AND ITS DISCONTENTS* (The New Press 1998); see also Saskia Sassen *The locational and institutional embeddedness of the Global Economy*, in TRANSATLANTIC REGULATORY COOPERATION, *supra* note 39, at 47.

country in which they are found. This is one of the structural sites to which Snyder alludes. Equally, the Internet does not create some new country called “cyberspace.” Transactions on the Internet have to come out somewhere, and they can be regulated, as the decision of the Tribunal de Grande Instance de Paris in the case of *LICRA & UEJF v. Yahoo! Inc. & Yahoo France* shows. In that case, the French court ordered Yahoo! Inc. to prevent web surfers in France from accessing Nazi artifacts via its Web site, in contravention of French laws that render trade in Nazi artifacts illegal. It rejected Yahoo! Inc.’s argument that the site was located in California and intended for use by an American audience, and that, therefore, any French order was ineffective as an unwarranted extraterritorial extension of French jurisdiction. The French Court held that it was entitled to make its decision on the basis that the harm was suffered in France. While Yahoo! Inc. was in no way committing an intentional wrong it was enough that by

permitting the visualisation in France of these objects and eventual participation of a surfer established in France in such an exposition/sale Yahoo! Inc. . . . committed a wrong on the territory of France.⁸⁵

Thus, Yahoo! Inc. was unable to say that it only operated from the United States and so had no actual presence in France. In addition, the fact that it operated a French website through its French subsidiary was not considered relevant. The French Court did not see this separate corporate presence as a bar to holding Yahoo! Inc. directly responsible for the harm caused by the accessing of information available on its U.S. site. So much for cyberspace! Though it is not easy to determine which country has the right to regulate—several other countries apart from France could equally have said they had such a right—it is clear that a territorial state *can* regulate if it sees fit. In addition, this case shows that so long as non-state actors operate across borders, and legal regimes continue to differ and to occupy distinct *political spaces*, private international law will remain central to the regulation of such activities.

Second, it is safe to say that public international law may not be a sufficient or a complete system for dealing with globalisation. The range of subjects it covers may be too narrow, it may exclude non-state actors from holding rights or duties and it may limit the range of dispute settlement options available to such actors.⁸⁶ Its main importance, outside the area of inter-state interactions, which includes the protection of fundamental human rights against the state, is to provide rules for the operation of IGOs, and for the creation of new norms by treaty. It may therefore be seen as a *procedural* law for the intergovernmental interactions that seek to regulate economic and social globalisation.

Third, substantive laws and practices, relevant to specific issue areas outside the realm of inter-state interactions, may become increasingly orders of supra-territorial law, but with the retention of stronger links to state-based legal territory than some of the theorists discussed above might suggest. The sources of such orders will be found in national laws and practices, in the emergent supranational legal orders of regional and intergovernmental

85. Decision affirmed 20 Nov. 2000 (unofficial English translation at <http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html>) (last visited Mar. 8, 2003); see also Uta Kohl, *Eggs, Jurisdiction, and the Internet* 51 INT’L & COMP. L.Q. 555 (2002); Jack Goldsmith, *Yahoo! Brought to Earth*, FIN. TIMES, Nov. 27, 2000, at 27.

86. Some will say that the new areas, such as international economic law, are still a part of international law, while others will exclude them as being outside this sphere.

organisations and in the customs and practices of relevant non-state actors—especially corporations, industry groups, and NGOs—that find recognition in official state legal orders and in legally recognised and legitimated private dispute settlement systems. In this sense a regime of global legal pluralism as described by Snyder is indeed developing, especially in fields useful to the development of global capital markets, trade and investment which, according to Braithwaite and Drahos, can be attributed to the dominance of the U.S. and western business interests in the development of new regimes.⁸⁷ Further developments in other areas cannot be ruled out, but the practical limits of such change should be borne in mind.

Lobbying over the future content and direction of such emergent orders, at both national and supranational levels, has been and will continue to be important in this process.⁸⁸ Indeed, it is necessary that future research in this area address more fully the issue of power and control over regulatory agendas. Equally, it is possible that directly effective rights and obligations may emerge from such regimes at the local level, as they already have done in the context of the EU legal order.⁸⁹ Furthermore, a new type of conflict of laws, that goes beyond the issues created by conflicts between national legal orders, is likely to emerge where discrete supra-territorial orders based on regional or intergovernmental organisations compete for regulatory control over certain actions. This has already been seen, for example in relations between the WTO and the EU.⁹⁰ There is clearly room for further research on these questions as well.

Fourth, comparative law needs to resolve the methodological conflict alluded to earlier. The outcome will depend on the direction in which the majority of its practitioners wish to go. If they prefer a legal hyperglobalist position, they will wish to show that law is indeed moving towards ever increasing harmony and uniformity, they will overlook profound cultural differences between laws and other order maintenance systems, and they may even try to sell their science by appeals to a higher natural law of globalisation, invoking no doubt the development of fundamental human rights as proof of such a thing. From the perspective of globalisation, they will show the way forward to some kind of new, mutually agreed cosmopolitan law.

On the other hand, comparative legal method, if taken seriously, will offer further evidence of separation in law, a kind of legal clash of civilisations, which goes beyond the earlier classification of legal systems into so-called legal families towards one that rests upon extra-legal cultural and social factors.⁹¹ Such orders are very unlikely to find common ground, or common cause, towards a genuinely global law. Thus, one is left with the feeling that comparative law method is at a politically significant cross-roads: either it takes a more academically credible route, along the lines suggested by Legrand and others, towards the study of difference, with all the problems of political diversity that that entails for the ideal of a global world order, or a cosmopolitan law—if you like. Or, it continues to be based on a search for crude a-historical, and culturally suspect, similarities of meaning and purpose in legal phenomena, which will deliver the illusion of an emergent global law serving as the

87. BRAITHWAITE & DRAHOS, *supra* note 35, at 27.

88. See also MUCHLINSKI, *supra* note 30; MUCHLINSKI, *supra* note 37.

89. See also Petersmann, *supra* note 49.

90. See, e.g., Stefan Griller, *Judicial Enforcement of WTO Law in the European Union*, 3 J. INT'L ECON. L. 441 (2000); *Hermes Int'l v. FHT Marketing Choice BV* [1998] ECR I 3603; *Schieving-Nijstad Vof et al. v. Robert Groeneveld* [2001] 3 CMLR 982.

91. See Van Hoecke & Warrington, *supra* note 24.

legal expression of globalisation. Perhaps the solution is to take account of the developing theories of global legal pluralism and to embrace the fact of diversity as an integral element in the creation of global law.

Fifth, what are we to do about human rights? The development of global power through MNE production and distribution chains, through IGOs and informal regulatory networks, will never be seen as legitimate without some type of public interest oriented scrutiny of such power, judged in the light of values other than purely economic ones. Human rights rules, as contained in international human rights instruments and codes developed by non-state actors, offer one such set of values. These values may indeed be universally acceptable just because so many states and non-state actors appear to have accepted them. Yet it remains hard to see human rights law as truly universal from a sociological and historical perspective. Viewed in this light, the force of the relativist argument cannot be lightly dismissed. On the other hand, the value of having a supra-territorial body of norms by which the legality of state and, possibly, non-state action can be judged cannot be dismissed either. In cases where the local legal order fails to protect certain basic civil, political, social, cultural, or economic values, such external intervention may be very useful. However, the ability of such intervention to make all things right must also be kept in perspective, as must the possibility that appeals to human rights will be used in a coercive and illegitimate manner as a tool of *realpolitik*.